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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARTY JAY LOVAN, Defendant and Appellant.	G039458 (Super. Ct. No. 05NF4816) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed in part, reversed in part and remanded for resentencing.

Richard de la Sota, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch, Scott C. Taylor and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Marty Jay Lovan appeals from the judgment entered after a jury found him guilty of possession of methamphetamine for sale, transportation of methamphetamine, and possession of controlled substance paraphernalia. Defendant argues the judgment should be reversed because the trial court erroneously denied his pretrial motion to suppress evidence he contends was obtained by police following an unjustified detention. He also contends his conviction for transportation of methamphetamine was not supported by substantial evidence.

We affirm the trial court's denial of defendant's motion to suppress because the record shows the police-initiated contact at issue was consensual and did not constitute a detention. We reverse, however, defendant's conviction for transportation of methamphetamine because substantial evidence did not support the finding defendant moved or transported methamphetamine from one location to another.

SUMMARY OF FACTS[1]

In the early afternoon of December 9, 2005, Officer Darren Lee of the Anaheim Police Department was on duty, patrolling the area around the Eagle Inn Motel, when he spotted a cream-colored vehicle backed into "the very last space in a row of parking stalls" of the motel's parking lot. Lee was driving a marked black-and-white police car, and was accompanied by Officer Dustin Ciscel and one other officer. Lee was wearing a black polo shirt (with an embroidered police badge on the front and the word "police" on the back), black pants, a full police duty belt, and black boots.[2]

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[1] The facts contained in this section are based on the testimony of Officer Darren Lee, Officer Dustin Ciscel, and defendant at the hearing on defendant's motion to suppress.

[2] No evidence was presented at the hearing on defendant's motion to suppress regarding what the other two officers were wearing. Trial testimony established the other two officers were dressed the same way Lee was.

Lee could see "the top of a person's head in the driver's seat" of the cream-colored car and he testified, "it looked as though the person was ducking down, trying to avoid me." Lee drove the police car through the parking lot toward the cream-colored car and parked at a perpendicular angle to the car, 10 to 15 feet away from it. The patrol car did not block the cream-colored car's path; Lee testified, "I intentionally parked my vehicle so I could allow the person access to leave if he wanted to."

Lee did not activate the police car's lights or siren. He got out of the police car and walked to the driver's door of the cream-colored car. He saw that the driver's door was closed and its window was rolled up, and heard the car's engine running. Ciscel walked to the rear of the car to conduct a license plate check through dispatch. Neither Lee nor Ciscel drew any weapon.

Lee identified defendant as the car's sole occupant who was seated in the driver's seat. Lee noticed the car's stereo was missing. He asked defendant, "can I talk to you out here real quick?" Defendant opened the car door and got out of the car. Lee asked defendant what he was doing. Defendant told Lee that he was sitting outside the motel because he was waiting for the housekeepers to finish cleaning his room. Lee asked defendant about the missing stereo and defendant told him the car never had a stereo.

Lee told defendant that the officers were looking for people engaged in narcotics activity and asked defendant about his narcotics use. Defendant told Lee that he had smoked some marijuana. Lee asked defendant, "do you have any drugs[?] Can I check your pockets real quick?" Defendant answered, "yeah, go ahead." Lee described defendant's demeanor as "nervous but very cooperative," while they were talking. Lee spoke to defendant in "[a] normal conversation[al] tone and volume."

Before searching defendant, Lee secured defendant's hands by instructing defendant to interlace his fingers behind his back; Lee held defendant's hands together with one hand and searched defendant with the other. No other officer touched defendant. Lee found $500 in cash and a cigarette box in defendant's shirt pocket. Lee opened the cigarette box and saw that it contained what he thought was methamphetamine. He handed the box to Ciscel for closer inspection. Ciscel asked defendant, in a conversational tone of voice, if he could check inside the cigarette box; defendant nodded. Ciscel confirmed the box contained methamphetamine. Lee also found $34 in defendant's right front pants pocket. At no time did defendant ask the officers to stop their search.

Lee arrested and handcuffed defendant and had him sit down either on the curb at the rear of the cream-colored car or on its bumper. Ciscel read defendant his rights under *Miranda v. Arizona* (1966) 384 U.S. 436; defendant said he understood his rights. Ciscel asked defendant whether he was aware of any other narcotics. Defendant told Ciscel there was a blue duffel bag inside his motel room. Defendant said that someone had dropped off the duffel bag the night before and it might contain narcotics. Ciscel asked if he could search the room. Defendant gave permission to search his room and directed the officers to a key inside the car.

Ciscel searched the motel room and found a blue duffel bag which contained narcotics pipes and a pair of jeans. In the coin pocket of the jeans, Ciscel found a baggie containing a substance that tested positive for methamphetamine. Also in the duffel bag was a large sandwich bag with a white crystal substance that resembled methamphetamine inside it; the substance did not test positive for the presence of methamphetamine.

Lee searched the car. He found a black leather jacket on the front passenger seat; the jacket did not contain any identification. In the pockets of the jacket, Lee found a digital scale, a glass methamphetamine pipe, a one-inch by two-inch baggie

containing a small spoon, about 50 new stamp-sized baggies, and six "miscellaneous" baggies with small amounts of methamphetamine inside. Lee also found a wallet on the front passenger seat, containing $100 and a bank check card with defendant's name and picture on it.

Defendant testified he was sitting in his car before police officers contacted him. He said he was waiting for the housekeeper to clean the motel room he and his family lived in. While he was sitting there, and before the police officers arrived, a man named "Joe" arrived and sat in the car with defendant for about 10 minutes.

Defendant further testified he did not see the police officers approach because he was bending down to connect a radio wire. He testified an officer knocked on his window, asked him what he was doing, asked for identification, and told him to get out of his car. He said the officer searched him without asking for his consent. He also said he never told the officers he smoked marijuana. He did consent to the officers searching his car. He stated he had $600 in his wallet he had received from his wife's paycheck that he was going to use to pay for the motel room.

Defendant stated the black jacket was not his and the police officer did not remove a cigarette box from his shirt pocket. Defendant acknowledged his contact with the officers was "[j]ust normal conversation" and they did not yell at him. He said the officers were nice to him.

PROCEDURAL BACKGROUND

Defendant was charged in an information with (1) possession of methamphetamine for sale in violation of Health and Safety Code section 11378; (2) sale or transportation of methamphetamine in violation of section 11379, subdivision (a); and (3) possession of controlled substance paraphernalia in violation of section 11364. Defendant filed a motion to suppress evidence obtained by the police officers on the ground the officers, without a warrant, and without probable cause, reasonable suspicion,

or consent, detained him and searched his person, his car, and his motel room in violation of his constitutional rights. Following an evidentiary hearing, the trial court denied defendant's motion on the ground the officers' contact with defendant was consensual.

At trial, Lee and Ciscel reiterated the testimony they gave at the hearing on defendant's motion to suppress about their contact with defendant. Ciscel further testified at trial that after he had read defendant his rights, defendant told Ciscel he was selling drugs to support his family. Although defendant did not tell Ciscel where any of the drugs found in the car came from, defendant generally stated that he would drive to meet a friend named Lou to pick up 10 bags of methamphetamine, drive back to the area around the motel, sell the bags, return $200 to Lou, and receive $50 back from Lou for the sales. Defendant also told Ciscel that the last time he saw Lou was the night before the incident with the police when Lou dropped off the blue duffel bag which the police found in defendant's motel room.

Defendant's wife testified at trial that on December 9, she had met defendant at lunchtime to give defendant money from her payroll check.

Defendant testified at trial that after he met his wife and got the money from her, he returned to the motel and sat in his parked car in the parking lot. He testified that about 15 minutes later the police officers contacted him. Shortly after he had returned to the motel, but before the police officers arrived, defendant stated that Joe got in the car and sat with defendant for one or two minutes. He testified Joe was wearing a black leather jacket. Joe told defendant he would give him money to pay for the motel room they shared and then he left. Defendant also testified that the blue duffel bag found in his motel room belonged to Joe, not to Lou. He also said he made up the story he told Ciscel about Lou and about selling drugs near the motel, because the police officers had told him if he admitted doing these things, they would release him.

The jury found defendant guilty on all three counts as charged in the information. The trial court suspended imposition of sentence and placed defendant on three years' formal probation on terms and conditions that included he serve 270 days in the Orange County jail. Defendant appealed. The trial court stayed jail time pending the resolution of this appeal.

DISCUSSION

I.

THE TRIAL COURT DID NOT ERR BY DENYING DEFENDANT'S MOTION TO SUPPRESS.

Defendant contends the trial court erroneously denied his motion to suppress evidence because the record showed the police officers' contact with defendant constituted a detention unsupported by a reasonable suspicion. As we will explain, the record shows the officers' contact with defendant constituted a consensual encounter. Defendant's motion to suppress, therefore, was properly denied.

The standard of review applicable to the trial court's denial of defendant's motion to suppress is well established: "'We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment [to the United States Constitution], we exercise our independent judgment.'" (*People v. Garry* (2007) 156 Cal.App.4th 1100, 1105-1106.)

The California Supreme Court has explained: "Police contacts with individuals may be placed into three broad categories ranging from the least to the most intrusive: consensual encounters that result in no restraint of liberty whatsoever; detentions, which are seizures of an individual that are strictly limited in duration, scope, and purpose; and formal arrests or comparable restraints on an individual's liberty. [Citations.] . . . Consensual encounters do not trigger Fourth Amendment scrutiny.

[Citation.] Unlike detentions, they require no articulable suspicion that the person has committed or is about to commit a crime." (*In re Manuel G.* (1997) 16 Cal.4th 805, 821; see *Florida v. Royer* (1983) 460 U.S. 491, 498 [a person "may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds"].)

The California Supreme Court has further stated: "The United States Supreme Court has made it clear that a detention does not occur when a police officer merely approaches an individual on the street and asks a few questions. [Citation.] As long as a reasonable person would feel free to disregard the police and go about his or her business, the encounter is consensual and no reasonable suspicion is required on the part of the officer. Only when the officer, by means of physical force or show of authority, in some manner restrains the individual's liberty, does a seizure occur." (*In re Manuel G., supra,* 16 Cal.4th at p. 821.) The test for determining the existence of a show of authority is objective; it is "'not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person.'" (*People v. Garry, supra,* 156 Cal.App.4th at p. 1106.)

"'[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.' [Citation.] This test assesses the coercive effect of police conduct as a whole, rather than emphasizing particular details of that conduct in isolation. [Citation.] Circumstances establishing a seizure might include any of the following: the presence of several officers, an officer's display of a weapon, some physical touching of the person, or the use of language or of a tone of voice indicating that compliance with the officer's request might be compelled." (*In re Manuel G., supra,* 16 Cal.4th at p. 821; see *Brendlin v. California* (2007) 551 U.S. __ , __ [127 S.Ct. 2400, 2405] [when "an individual's

submission to a show of governmental authority takes the form of passive acquiescence, . . . a seizure occurs if 'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave'"].)

Here, the record shows Lee alone approached the driver's side of defendant's car and asked him, "can I talk to you out here real quick?" Defendant responded by getting out of his car and engaging in conversation with Lee. Lee did not accuse defendant of engaging in narcotics activity. Instead, he told defendant that the officers were looking for people who were engaged in such activities and asked him, "do you have any drugs[?]" and "[c]an I check your pockets real quick?" Defendant responded, "yeah, go ahead."

While two other officers were present at the scene, the record shows Ciscel went to the rear of the vehicle to conduct a license plate check. (*People v. Bouser* (1994) 26 Cal.App.4th 1280, 1287 [an officer's conduct of running a warrant check on a defendant, even when coupled with questioning of that defendant, did not constitute a detention].) Defendant testified the third officer was standing somewhere on the passenger side of the car; that officer's role, if any, in the contact is not revealed by the record.

Lee and Ciscel spoke to defendant in a conversational tone of voice. Defendant testified they did not yell at him; instead he described them as "nice." Neither Lee nor Ciscel drew any weapons or physically touched defendant before he gave Lee consent to search him for drugs.[3]

The record does not otherwise establish the officers made "a show of authority" that restrained defendant's liberty. (See *People v. Garry, supra,* 156 Cal.App.4th at p. 1106.) After spotting defendant sitting in his car, Lee drove the police car toward defendant's car without activating the siren or any lights; Lee parked the

[3] There was no evidence the third officer drew a weapon or touched defendant.

police car 10 to 15 feet away from defendant's car. (See *id.* at pp. 1111-1112 [suspect detained under circumstances where he was "suddenly illuminated by a police spotlight with a uniformed, armed officer rushing directly at him asking about his legal status"].) Lee testified the patrol car did not block the path of defendant's car and defendant had "access to leave if he wanted to." (See *People v. Wilkins* (1986) 186 Cal.App.3d 804, 809 [vehicle occupants were seized when officer stopped his marked patrol car behind vehicle "in such a way that the exit of the parked vehicle was prevented"].)

Defendant cites *Wilson v. Superior Court* (1983) 34 Cal.3d 777 in support of his argument Lee's contact with defendant constituted a detention. But the facts in *Wilson v. Superior Court* are distinguishable because, in that case, a police officer confronted the defendant at an airport with the statement the police had information the defendant was carrying drugs. (*Id.* at p. 790.) The Supreme Court explained: "[I]t is evident that [the police officer] did not detain [the defendant], for federal constitutional purposes, merely by approaching him, identifying himself as a police officer, and asking if he might have a minute of his time. At that point, however, the officer did not simply ask [the defendant] if he would permit a search of his luggage. Instead, he advised [the defendant] that he was conducting a narcotics investigation and that he 'had received information that [the defendant] . . . would be arriving today from Florida carrying a lot of drugs.' . . . [¶] Common sense suggests to us that in such a situation, an ordinary citizen, confronted by a narcotics agent who has just told him that he has information that the citizen is carrying a lot of drugs, would not feel at liberty simply to walk away from the officer. Before [the officer] made that statement, [the defendant] might well have thought that the officer was simply pursing routine, general investigatory activities, and might reasonably have felt free to explain to the officer that he had an important appointment to keep and did not have the time—or, perhaps, the inclination—to answer the officer's questions or to comply with his requests for permission to search. Once the officer advised [the defendant] that he had information that [the defendant] was carrying

a lot of drugs, the entire complexion of the encounter changed and [the defendant] could not help but understand that at that point he was the focus of the officer's particularized suspicion. Under these circumstances—and particularly in the absence of any clarifying advice from the officer explaining to [the defendant] that he was, in fact, free to drive away if he desired—no reasonable person would have believed that he was free to leave." [Citations.] [¶] Accordingly, we conclude that [the defendant] was detained, within the meaning of the Fourth Amendment, when he consented to the search of his attache case. Of course, if—as [the officer] represented—the police did in fact have additional information indicating that [the defendant] would be transporting narcotics, that information might well have provided a reasonable basis for the detention, in which case [the defendant]'s consent would have been validly obtained. As we have explained, however, the prosecution—despite fair warning—failed to present the relevant testimony to substantiate the alleged information. On this record, we can only conclude that the police detained [the defendant] in violation of the Fourth Amendment, and that the trial court erred in failing to suppress the evidence obtained as a result of that illegal detention." (*Id.* at pp. 790-791, italics omitted.)

As discussed *ante*, substantial evidence supported the finding Lee asked defendant if he would step out of the car to speak with Lee and that Lee told defendant that the officers were looking for people engaged in narcotics activity. Unlike the facts of *Wilson v. Superior Court, supra,* 34 Cal.3d 777, the record here does not show Lee or any other officer suggested to defendant that they were doing anything other than "simply pursuing routine, general investigatory activities." (*Id.* at p. 790.)

The trial court, therefore, did not err by denying defendant's motion to suppress.

II.

DEFENDANT'S CONVICTION FOR TRANSPORTING METHAMPHETAMINE WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

Defendant argues there was insufficient evidence he transported the methamphetamine that was found in his possession, and that his conviction for transporting methamphetamine must therefore be reversed. We agree.

"'In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may reverse for lack of substantial evidence only if "'upon no hypothesis whatever is there sufficient substantial evidence to support'" the conviction. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

"'Transportation of a controlled substance is established by carrying or conveying a usable quantity of a controlled substance with knowledge of its presence and illegal character.' [Citations.] 'The crux of the crime of transporting is movement of the contraband from one place to another.' [Citations.]" (*People v. Ormiston* (2003) 105 Cal.App.4th 676, 682.)[4]

In *People v. Kilborn* (1970) 7 Cal.App.3d 998, 1003-1004, the appellate court affirmed the defendant's conviction for possession of restricted dangerous drugs for sale but reversed his conviction for transporting restricted dangerous drugs on the ground it was not supported by substantial evidence. In *People v. Kilborn*, the record showed the defendant flew from Seattle to San Diego, rented a car, registered at a motel, and made

[4] In *People v. Ormiston, supra,* 105 Cal.App.4th at page 683, the court stated the statute prohibiting transportation of illegal substances is designed to "'inhibit the trafficking and proliferation of controlled substances by deterring their movement.'"

contact by telephone with two men from whom he had arranged to buy marijuana. (*Id.* at p. 1001.) The two men came to the motel to meet the defendant, stated it was a bad place to deliver the marijuana, and offered to take the defendant to their place in the country to complete the transaction. (*Ibid.*) The defendant went with them to a rural area where, "at gun point, he was relieved of his wallet containing in excess of $7,000." (*Ibid.*) The defendant was later questioned in the sheriff's substation for over an hour. (*Ibid.*) Two deputy sheriffs accompanied the defendant back to his motel room which was unlocked. (*Ibid*.) The deputy sheriffs found three empty footlockers the defendant had brought from Seattle to store the marijuana he had hoped to buy. (*Ibid*.) They also found a small box, inside the defendant's suitcase, which contained 196 pills of LSD. (*Ibid*.) The defendant said he knew nothing about the pills. (*Ibid*.)

The appellate court in *People v. Kilborn* reversed the conviction for transporting restricted dangerous drugs, stating: "The crux of the crime of transporting is movement of the contraband from one place to another. The prosecution had the burden to present evidence bearing on this requirement and connecting appellant with it. The Attorney General has presented no case in which a conviction for transportation has been upheld under similar circumstances. The vice of the argument the pills found in appellant's possession must have been transported there in some manner, ergo, appellant transported them, is it substitutes speculation and conjecture for competent proof. Carried to its logical conclusion, the argument would permit conviction for transporting in any case where possession is proved. We do not believe this to be the purpose or intent of the statute forbidding transporting drugs. That statute, properly applied, serves a useful purpose in the legislative scheme outlawing drugs. Reprehensible as appellant's admitted involvement with drugs and narcotics may be, that fact cannot justify a misuse of the statute to bring about an additional conviction where the evidence falls short and proves only crimes of possession." (*People v. Kilborn, supra,* 7 Cal.App.3d at p. 1003.)

Here, the record does not contain substantial evidence defendant himself moved methamphetamine. The record shows the police found defendant sitting in the driver's seat of his parked car (albeit with the engine running). Defendant testified he had been sitting in his car for about 15 minutes before the police arrived, during which time he testified Joe had sat in the car briefly and left. The record shows Lee found methamphetamine in a cigarette box in defendant's shirt pocket and in baggies in the black leather jacket located on the front passenger seat of his car; but there is simply no evidence showing how the methamphetamine got there, or whether it was in the car when defendant drove the car to meet his wife and then back to the motel.

The Attorney General argues, "[b]ased on all of these facts there was sufficient circumstantial evidence for a reasonable trier of fact to determine that the methamphetamine was recently in transit." The issue, however, is whether substantial evidence supported the finding that defendant moved the methamphetamine. We cannot conclude he transported the methamphetamine because the police officers found methamphetamine on his person and in his parked car because to do so would substitute speculation for competent proof.

The Attorney General argues this case is "analogous" to *People v. Vasquez* (1955) 135 Cal.App.2d 446. But, in *People v. Vasquez*, the record contained evidence the defendant continued to drive his car after his passenger showed him a package of marijuana, told the defendant it was marijuana, and placed the package in the ashtray of the car. The passenger told the defendant he would say that the package was his own and that the defendant "had nothing to worry about." (*Id.* at p. 448.).

In contrast to *People v. Vasquez, supra,* 135 Cal.App.2d 446, our record is devoid of evidence showing how the methamphetamine found in defendant's possession got there or whether defendant himself ever moved or otherwise transported it.

DISPOSITION

We reverse defendant's conviction for transportation of methamphetamine. We otherwise affirm the judgment in full. We remand for resentencing.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.